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No. 82-319.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

RONALD PODGURSKI AND EDWARD J. COLLINS, III,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent-Podgurski in Opposition.

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Questions Presented.

1. Whether the decision of the Supreme Judicial Court of Massachusetts affirming a superior court allowance of a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. § 1257(3).

2. Whether the respondent Podgurski possessed the necessary standing to object to an illegal search and seizure of the property owned by the co-defendant Collins.

Table of Contents.

Opinion below	1
Constitutional and statutory provisions involved	1
Jurisdiction	2
Statement of the case	3
Statement of the facts	3
Reasons for denying the writ	3
I. The decision of the Supreme Judicial Court of Massachusetts lacks finality and is not a final judgment under 28 U.S.C. § 1257(3)	3
II. Since the decision of the Supreme Judicial Court of Massachusetts may be based on an adequate and independent state ground, this honorable court should either dismiss the writ of certiorari as improvidently granted or remand the case to the Supreme Judicial Court to clarify the basis of its decision	4
III. The Supreme Judicial Court of Massachusetts was plainly correct in affirming an order by a lower court holding that evidence seized in violation of the Fourth Amendment to the Constitution of the United States and Article Fourteen of the Declaration of Rights of the Massachusetts Constitution may not be used to establish probable cause to search a vehicle without a valid search warrant	5
IV. The respondent Podgurski possessed proper standing to object to the unlawful search and seizure of the vehicle owned by the co-defendant	5
Conclusion	8

Table of Authorities Cited.

Cases.

Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949)	4
Cohen v. New York, 385 U.S. 976 (1976)	4
Commonwealth v. Podgurski, 386 Mass. 385, 436 N.E. 2d 150 (1982)	1
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	5
California v. Stewart, 384 U.S. 436 (1966)	3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	3
Herb v. Pitcairn, 324 U.S. 117 (1945)	4
Jones v. United States, 362 U.S. 257 (1960)	5
Rakas v. Illinois, 439 U.S. 128 (1978)	5, 7
Rawlings v. Kentucky, 448 U.S. 98 (1980)	6, 7
Sullivan v. District Court of Hampshire, Mass. Adv. Sh. (1981) 2370	4
United States v. Salvucci, 448 U.S. 83 (1980)	6

Statutes.

United States Constitution	2
Fourth Amendment	1, 4, 5
Fourteenth Amendment	2
28 U.S.C. § 1257(3)	2, 3, 4
Massachusetts Constitution	4
Declaration of Rights	
Article Fourteen	4, 5

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Opinion Below.

The opinion of the court below (Pet. A. A) is reported at 386 Mass. 385, 436 N.E. 2d 150 (1982).

Constitutional and Statutory Provisions Involved.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

28 U.S.C. § 1257(3) provides:

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Jurisdiction.

The decision of the court below was entered on June 2, 1982. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3). The respondent respectfully suggests that the "judgment" of the court below is an inadequate basis for jurisdiction under 28 U.S.C. § 1257(3), because the judgment lacks finality.

Statement of the Case.

The petitioner's statement of the case describing the proceedings below adequately sets forth the chronology of the state court proceedings.

Statement of the Facts.

The facts of this case are stated fully in the petitioner's brief (Pet. A. 4-16) and in the amended findings and orders of defendants' motion to suppress of the Massachusetts superior court trial judge (Pet. A. D).

Reasons for Denying the Writ.

I. The Decision of the Supreme Judicial Court of Massachusetts Lacks Finality and is Not a Final Judgment Under 28 U.S.C. § 1257(3).

It is settled that the Supreme Court of the United States has appellate jurisdiction of state litigation "only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree'". *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-477 (1975).

Respondent contends that since he is subject to further proceedings in Massachusetts, the Supreme Judicial Court's decision is not "final".

It is submitted that the denial of the motion to dismiss for lack of finality in *California* v. *Stewart*, 384 U.S. 436, 498 n.71 (1966), did not create an unvarying rule that all decisions of a

state's highest court concerning a motion to suppress evidence are final for purposes of jurisdiction under 28 U.S.C. § 1257(3). See, e.g., *Cohen* v. *New York*, 385 U.S. 976 (1966).

Further, respondent contends that this Court's limitation in *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 547 (1949) that "we do not mean that every order fixing security is subject to appeal[; h]ere it is the right to security that presents a *serious and unsettled question*," (emphasis supplied) is applicable to the case at bar.

II. Since the Decision of the Supreme Judicial Court of Massachusetts May be Based on an Adequate and Independent State Ground, This Honorable Court Should Either Dismiss the Writ of Certiorari as Improvidently Granted or Remand the Case to the Supreme Judicial Court to Clarify the Basis of its Decision.

It is established that the United States Supreme Court "will not review judgments of state courts that rest adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). Respondent contends that the decision of the Supreme Judicial Court of Massachusetts is unclear as to whether it was based on interpretation of the Constitution of the United States or the Constitution of the Commonwealth of Massachusetts or both.

The respondent in his motion to suppress evidence alleged violation of his rights against unreasonable searches and seizures as contained in the Fourth Amendment of the Constitution of the United States and Article Fourteen of the Declaration of Rights of the Massachusetts Constitution.

In its decision in the case at bar, the Supreme Judicial Court relied principally on the opinion of said court in *Sullivan* v. *District Court of Hampshire*, Mass. Adv. Sh. (1981) 2370,

2375-2376, in concluding that the search of the vehicle in question was the result of the unlawful intrusion of the police in violation of the respondents' rights.

III. The Supreme Judicial Court of Massachusetts was Plainly Correct in Affirming an Order by a Lower Court Holding that Evidence Seized in Violation of the Fourth Amendment to the Constitution of the United States and Article Fourteen of the Declaration of Rights of the Massachusetts Constitution May Not be Used to Establish Probable Cause to Search a Vehicle without a Valid Search Warrant.

Respondent contends that the theory underlying *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) compels the conclusion that the unanimous decision of the Supreme Judicial Court was correct.

In *Coolidge*, *supra* at 461, this Court has held that "the word "automobile" is not a talisman before which the Fourth Amendment fades away and disappears.

IV. The Respondent Podgurski Possessed Proper Standing to Object to the Unlawful Search and Seizure of the Vehicle Owned by the Co-defendant.

While it is clear that the holding in *Rakas* v. *Illinois*, 439 U.S. 128 (1978) substantially reversed the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), it is also clear that neither *Rakas*, nor any of its progeny upon which the Commonwealth would rely, is analogous to the instant case.

Rakas, *supra*, concerned firearms seized in an automobile which neither defendant either owned or leased. Said case

also revealed that the actions of the police were not challenged. Thus, the court held that under these facts, there existed no legitimate expectation of privacy.

The facts in this case before this Court are substantially different. Here, the van in question was clearly owned by Collins, and Podgurski, a nearly life-long friend, was his invited guest.

Under these facts it is reasonable to infer that Podgurski possessed a legitimate expectation of privacy within the Collins vehicle.

In *United States* v. *Salvucci*, 448 U.S. 83 (1980), the matter related to stolen mail found in an apartment rented by the mother of the co-defendant. The search in said case was conducted pursuant to a validly issued warrant in a premises in which neither defendant lived.

Again, the court ruled that there existed no legitimate expectation of privacy by the respondent in the property searched.

The facts in the instant case reveal a warrantless search of property actually owned by one co-defendant with the other co-defendant being his guest. The respondent Podgurski respectfully submits that these facts indicate his expectation of privacy in the searched vehicle.

In the same term as *Salvucci*, the Supreme Court entertained the case of *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), which questioned the legality of a search of a companion's purse located in a house in which neither party lived.

The court held that *Rawlings* did not have standing to object to the search as he could not show that he possessed his *own* legitimate expectation of privacy in the searched purse.

In the instant case, the hearing judge in the superior court quoted from the *Rawlings* decision ruling:

> [i]t remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet failed

to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.

Rawlings v. *Kentucky*, *supra*, at 112 (Blackmun, J., concurring).

Justice Blackmun's explication of the holding in *Rawlings* derives considerable support from the *Rakas* decision. The concurring and dissenting opinions in *Rakas* recognize that the Fourth Amendment was designed, in part, to protect the liberty and property interests of the *person*. The concurring opinion in *Rakas* is careful to point out that "[t]he petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle." *Rakas* v. *Illinois*, *supra* at 150-151 (Powell, J. Burger, C.J., concurring). Hence, it is clear that *Rakas* did not deal with the question of standing to contest an unconstitutional stop.

Further, the hearing judge found that, under the facts of the present case, Mr. Podgurski had his own freedom, privacy and solitude intruded upon by the police.

The common thread running through all these cases is that of the respondent's having a legitimate expectation of privacy in the searched property.

The hearing judge found that Podgurski had an expectation of privacy within the seized items, and thus he had standing to object to the illegal search.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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